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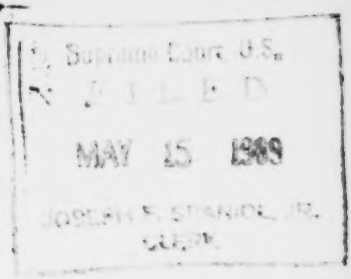

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

DONALD WAYNE HOWARD,

PETITIONER,

vs.

ORVILLE PUNG, COMMISSIONER OF CORRECTIONS; AND FRANK WOOD, WARDEN, OAK PARK HEIGHTS FACILITY,

APPELLEES.

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Whether admission of a lengthy confession obtained in violation of the rule in Edwards v. Arizona, 451 U.S. 477 (1981) and which led to key prosecution evidence could possibly be deemed harmless error under the facts of this case.

PARTIES TO THE PROCEDURE

The parties to the proceedings are as follows:

DONALD WAYNE HOWARD,

Petitioner,

vs.

ORVILLE PUNG, COMMISSIONER OF CORRECTIONS; AND FRANK WOOD, WARDEN, OAK PARK HEIGHTS FACILITY,

Appellees.

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OPINION BELOW

The opinion of the Eighth Circuit Court of Appeals, whose judgment is sought to be reviewed, is reprinted in Appendix A.

JURISDICTION

The judgment of the Eighth Circuit Court of Appeals was filed December 16, 1988. Appendix A. A timely petition for rehearing was denied on February 14, 1989. Appendix B. This petition was filed within ninety days of the date rehearing was denied. This Court's jurisdiction is invoked under Title 28 of United States Code Section 2101(d).

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitution of the United States provides:

> Amendment V: "No person . . . shall be compelled in any criminal case to be a witness against himself . . ."
>
> Amendment XIV: ". . .nor shall any state deprive any person of life, liberty or property, without due process of law, . . ."

STATEMENT OF THE CASE

Petitioner, Donald Wayne Howard, was indicted in Winona, Minnesota for murder in the first degree, in violation of Minn. Stat. §609.185(1) and conspiracy-to-commit-murder in violation of Minn. Stat. §609.175, Subd. 2(2). Petitioner was accused of hiring Bruce Webber to kill his wife, Shirleen Howard. Petitioner was tried by a jury on January 31, 1978, and was convicted on both counts.

Petitioner was arrested in his Winona, Minnesota home the night of August 23, 1977, for the murder of his wife. The police believed that Mr. Howard had hired another unknown man to kill his wife. Upon arrival at the Winona Police Station that evening, agent

Rysavy of the Minnesota Bureau of Criminal Apprehension began interrogating Howard. Excerpts from the August 23, 1977, interrogation are as follows:

> Rysavy: We want the "hit man" Don. We want to make sure nobody else gets hurt.
>
> Howard: [I don't know] what you're talking about.
>
> Rysavy: These boys here have done a fine, fine job gathering evidence and accumulating things to bring this to a head. That's why we're here right now. You're accused of the murder of your wife because we feel you planned it. We don't feel that you carried it out yourself. We're sure of that. But we do feel that you hired it done and the man that you hired is the one we want. We want him bad, because we feel other peoples' lives are in jeopardy right now. Other people that you've contacted to get the job done. You weren't very secretive about it, I'll be truthful with you there.
>
> Howard: What is there . . . what are you talking about

there?

Rysavy: Tomorrow he's going to hear on the news - and this is going to be big news - that you've been taken into custody. You still got two little girls out there to be concerned about. This guy could make an attempt to get those girls just to make you keep your mouth shut.

Howard: What guy now? Which guy?

Rysavy: The guy you hired to kill your wife. Now that you're in custody is going to want to be sure you keep your mouth shut. You got your two little girls to be considered. We're concerned about them also. We're concerned about these people that have come forth with the information that has got you here now. We want this guy. We want him bad. You can give him to us.

Howard: I can't. I don't know him.

Rysavy: You planned your wife's death with another person. We're not saying you actually killed her. We want the man that did. For the sake of your two little girls and for the sake of the other people that

have been good enough to come forward . . .

Howard: I can't tell you any more.

Rysavy: You can't or you won't.

Howard: I can't - 'cause I don't know who actually done it.

Rysavy: Tell me what transpired. You realize if you tell me the whole store [sic] you're going to involve yourself all the more. I told you the evidence that we've accumulated and I think you'll agree we've done fairly good.

Howard: I don't think I'd better say anymore -- til I have an attorney.

Instead of stopping the interrogation here, Rysavy continued on, asking at least ten more questions.

Rysavy: Do you want to en our conversation now:

Howard: I'll talk as long as you want to, but . . .

Rysavy: Well, you just said you didn't want to say anymore until

you had an attorney.

Howard: Well I guess I won't make any conversation.

Rysavy: Do you recall when we first started and I advised you of your rights, the last thing I said to you - we could stop talking at anytime during our conversation you'd just say so. Is this that time?

Howard: I guess so, yeah.

Rysavy: You think it is. You want to think on it. All right, Don, not just so that I have the last word or anything do you feel that I lied to you at any time during our conversation?

Howard: I think you're guessing.

State's Omnibus Exhibit 15

The next morning, the 24th of August four police officers gathered at the Winona County Jail to obtain a confession (O.T.81).[1] No effort was made to provide

---

1. "O.T.-x" refers to pages in a transcript of the Omnibus Hearing held September 23, 1977 in Winona County District Court.

Howard with counsel. Rysavy again read Howard his rights:

> Rysavy: You're entitled to confer with an attorney and have one present during our questioning. If you cannot afford an attorney, one will be appointed for you immediately. Do you understand all those, Don?
>
> Howard: Yeah, why don't I have an attorney here now?
>
> Rysavy: Why don't you? Ah, would you rather have one present during our questioning.
>
> Howard: Well, ah, no I guess not. I, ah . . . guess.

Trial Transcript at 2478-79.

Rysavy told Howard that his concern was for Howard's daughters and asked Howard to help to insure the safety of his daughters. Howard then gave a lengthy detailed confession regarding his hiring of Bruce Webber to kill his wife. When asked by his interrogators to supply them with some concrete evid-

which would connect him with his hired killer, Webber, the following exchange occurred:

> RYSAVY: Don, I've started the tape recorder again and during the period it was off we discussed the matter that ah, that ah, is pertinent to the time the tape recorder was off, you asked shouldn't I have an attorney present. And, I asked you if you had one you wanted to call and you said you didn't have an attorney and ah, we got to discussing the fact of the court appointed attorney and then I said that we probably shouldn't discuss that, that would be up to the Court, ah, I do feel this information is pertinent to the investigation and I would like to get it on,
>
> * * * * *
>
> Rysavy: . . . Don will you repeat what what, we discussed?
>
> * * * * *
>
> Howard: Well he had to have more money and he had to and

then the ring, and $1,500.00

Rysavy: And you completed that when?

Howard: Yesterday morning.

Rysavy: You sent him $1,500.00 and a diamond ring:

Howard: Wrapped up in a magazine, wrapped on the outside with a brown paper and shipping tape and sent it certified mail at the Winona post office at 11:00, 10:00, 11:00.

Rysavy: And it was mailed to Bruce Webber at an address of 811 Moen I think it is in Joliet?

Howard: Right.

State's Omnibus Exhibit 16.

Bruce Webber was arrested in Joliet, Illinois after he accepted delivery of the package which Howard described as Webber's payment for committing the murder. See page A-12 of this petition. Unquestionably, Howard's August 24th

confession led to the arrest of Webber and Webber's indictment for first degree murder.

The Eighth Circuit Court of Appeals noted that the investigation had already focused on Webber and Joliet, Illinois by the time Howard gave his confession See page A-12. Indeed, the police had found in Howard's home phone records indicating numerous call to Joliet, Illinois. All leads to a Joliet, Illinois connection provided fruitless however until Howard gave the police the essential link between himself and Webber.

Webber's Joliet home had been searched pursuant to a warrant before Howard's confession, but Webber had not been charged nor arrested. See State v. Webber, 292 N.W2d 5, 8 (Minn. 1980).

The murder weapon that was the object of the search warrant, which was not found at Webber's home. Not until the law enforcement officers intercepted the final payment package and made a controlled delivery to Webber was the link made between Howard, the conspirator, and the actual killer, Webber.

The Eighth Circuit Court of Appeals implicitly found that petitioner's fifth amendment right under Edwards v. Arizona, 451 U.S. 477 (1981), was violation but the found that any error in admitting Howard's lenghthy confession was harmless. Upon introducing the Edwards issue, the Eighth Circuit stated, "[A]ssuming for argument's sake that Howard was entitled to the benefit of Edwards we conclude that any error in admitting his confession was harmless beyond a

reasonable doubt. Chapman v. California, 386 U.S. 18, 24 (1967); Johnson v. Nix, 763 F.2d 344, 346-347 (8th Cir. 1985)." See Page A-10. In its conclusion, the Eighth Circuit Court stated, "we conclude that the evidence against Howard was so overwhelming as to render harmless any violation of his rights under Edwards." See page A-13. Petitioner's conviction was affirmed and his petition for certiorari denied by this Court. State v. Howard, 324 N.W.2d 216 (Minn. 1982) cert. denied 459 U.S. 1172 (1983). A petition for writ of habeas corpus was denied in 1984 upon a finding by the district court that the petition contained exhausted and unexhausted claims. Howard v. Pung, Civil 4-83-465 (D. Minn. 1984).

A petition for post conviction relief to the trial court on the unexhausted claim was denied. Denial of that petition for relief was affirmed by the Minnesota Supreme Court in State v. Howard, 373 N.W.2d 596 (Minn. 1985). A petition for writ of habeas corpus was again filed and it is the denial of that petition and the Eighth Circuit Court's affirmance of that denial (decision in Appendix A) for which certiorari is requested.

REASONS FOR GRANTING WRIT

Certiorari should be granted because the Eighth Circuit Court of Appeals misapprehended the facts of petitioner's case which resulted in a misapplication of the law regarding harmless error. The Eighth Circuit Court's decision is in direct conflict with the decisions of this Court on harmless error.

A determination of harmless error is a mixed question of law and fact. See Cuyler v. Sullivan, 446 U.S. 332 (1980); Lacy v. Gabriel, 567 S.Sup 467 (D.Mass.1983) aff'd 732 F.2d 7 (1st Cir. (1984). The legal standard was set forth in Chapman v. California, 386 U.S. 18 (1967), where this Court announced that before a Federal Constitutional error could be held harmless, it must be declared harmless beyond a reasonable doubt. Id. at 24. The burden of showing harmless error is upon the beneficiary of the rule, the Government. Id; accord Satterwhite v. Texas, 486 U.S.___, 108 S. Ct. ___, 100 L.Ed 2d 284, 295 (1988). Harmlessness must be determined based upon the evidence remaining absent the illegally

admitted evidence. See Coy v. Iowa, 487 U.S. ___, 108 S.Ct. ___, 101 L.Ed.2d 857, 867, (1988).

Factually, the Eighth Circuit based its determination of harmless error on the following evidence against petitioner: his implicit admission of participation in the crime to a friend (Riniker) who was wired; and evidence that petitioner had attempted to hire others to kill his wife. See pages A-11 - A-12.

This evidence was admittedly incriminating and damaging to petitioner's case, however the evidence was circumstantial and did not lead unerringly to the conclusion that petitioner, Howard, hired Bruce Webber to have his wife killed. Conspiracy for murder in Minnesota could not have been established

without establishing a perpetrator of the murder. See Minn. Stat. §609.05, §609.185. The jury in fact was instructed in accordance with 10 Minnesota Practice Criminal Jury Instructions Guide (CRIMJIG) §4.01 (West 1977) as follows:

> For the defendant Donald Howard to be found guilty of the crime of first degree murder you must that he intentionally aided, advised, counselled with or conspired with another to commit the crime of first degree murder and that the other person did commit the crime in fact, as I have defined it.

Trial transcript at 2884.

The interrogator advised petitioner August 23, 1977 that he and the other law enforcement persons knew that petitioner was not the actual perpetrator of the murder. See pp. 4-5 infra. The other persons who testified at trial that pettitioner had approached them and asked

them to kill his wife were not suspects in the murder. At the time of petitioner's arrest and his interrogations August 23 and 24, 1977, the law enforcement officers suspected petitioner of conspiring with another unknown person to have his wife killed.

The State has never argued that Webber would have been "inevitably discovered" absent petitioner's confession. Rather, the State has always contended that the remaining evidence against Howard was sufficient to sustain his conviction. There is no basis for any claim that Webber would have been inevitably discovered. The search of Webber's home prior to petitioner's confession proved fruitless. The agents had no reason to reinvestigate Webber until petitioner's confession.

Petitioner Howard provided the prosecution with the link between himself and Webber. During the interrogation which the police officers reinitiated August 24, after petitioner's arrest, petitioner admitted his participation in the plan to have his wife murdered. When the interrogator asked Howard to provide them with some "concrete evidence" that would connect petitioner and the actual killer, petitioner then explained how he had just mailed the final payment of $1,500.00 to the killer the day before and he described in detail how that package was wrapped and what was included with it. Bruce Webber was arrested in Joliet, Illinois after he accepted delivery of the package which Howard described as Webber's final payment for committing the murder.

The package that was intercepted was considered "the most significant evidence" against Webber at his trial. See State v. Webber, 292 N.W.2d 5, 9 (Minn. 1980). Similarly, that evidence was the key to petitioner's conviction at his trial. The prosecutor virtually began his closing argument by stating, "Well, the confession of August 24, 1977, that Bob Rysavy got really covers it all, doesn't it? In that August 24th confession, defendant told Rysavy . . . that he paid Webber $2,000.00 in January . . .. In addition, showing agreement, you have the evidence that the defendant sent to Webber the $1,500.00, the diamond ring, and the note." Trial transcript at 2764-65.

To reiterate, aside from Howard's confession on August 24, 1977 and the

intercepted package mailed to Webber, the State merely had evidence of Howard's conversations with others regarding the killing of his wife. Not until the package from Howard was delivered to Webber was there sufficient evidence to even arrest Webber and prosecute both men.

Howard's confession was lengthy and detailed. This is not a case where a confession was merely cumulative evidence. See Johnson v. Nix, 763 F.2d 344 (8th Circuit 1985). There were no eyewitnesses to the murder. See egs. Harrington v. California, 395 U.S. 296 (1969); Cannito v. Sigler, 449 F.2d 542 (8th Circuit 1971). The evidence against the petitioner, absent his confession and its fruits, was totally woven in circumstantial evidence. Investigating officers may have had good reason to

suspect petitioner had some culpability in his wife's murder but a murder could not have been established nor petitioner's culpability absent the illegally obtained confession and its fruits.

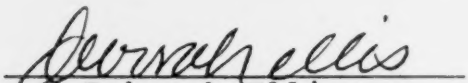
The issue is not whether petitioner may have been convicted absent his confession, rather whether the State met its burden of showing beyond a reasonable doubt that the remaining evidence was sufficient to sustain the conviction. Pettitioner submits that the threshhold was not met. The Eighth Circuit Court of Appeals misapprehended the sequence of events that transpired after petitioner's confession was given, i.e. The confession provided the State with the evidence it needed to prove a murder, a necessary element to sustain petitioner's conviction as an aider and abettor to first degree murder.

CONCLUSION

Based upon the foregoing, petitioner urges this Court to grant his petition for writ of certiorari to correct a manifest injustice left by the Eighth Circuit Court of Appeals' decision and to reconcile that Circuit Court's decision with established authority of this Court regarding harmless error.

A fair reading of the facts in this case does not support a finding that the error in admitting petitioner's illegally obtained confession was harmless beyond a reasonable doubt.

Respectfully submitted,



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Appendix A

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 88-5015

Donald Wayne Howard,	*	
Appellant,	*	
v.	*	Appeal from the United States District Court for the District of Minnesota.
Orville Pung, Commissioner of Corrections; and Frank Wood, Warden, Oak Park Heights Facility,	*	
Appellees.	*	

Submitted: October 21, 1988

Filed: December 16, 1988

Before HEANEY, Circuit Judge, HENLY, Senior Circuit Judge, and FAGG, Circuit Judge.

HENLEY, Senior Circuit Judge.

Donald Wayne Howard appeals from the district court's[1] denial of his petition for a writ of habeas corpus, 28 U.S.C. § 2254, in which he challenged his Minnesota state court conviction for the first degree murder of his wife Shirleen Howard. We affirm.

The facts of this case are fully set forth in the opinion of the Supreme Court of Minnesota affirming the partial denial of post-conviction relief. State v. Howard, 324 N.W.2d 216 (Minn. 1982). cert. denied, 459 U.S. 1172 (1983). Howard was convicted of hiring Bruce Webber to kill his wife. He had attempted to hire three other men to commit the

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[1]The Honorable Diana Murphy, United States District Judge, District of Minnesota

killing before Webber ultimately agreed.[2] After the killing occurred, the police obtained the cooperation of one of those men, Raymond Riniker. Riniker arranged a meeting with Howard at Howard's home. Before he went, a microphone/transmitter was taped to his chest underneath his shirt so that the police could monitor the conversation between the two men. During Riniker's visit, Howard made inculpatory statements concerning the death of his wife. When Riniker left the house, the police went to arrest Howard. They knocked on the door, at first receiving no response. Howard then came to the door, opening it and stepping back into the kitchen approx-

---

[2]Webber has also been convicted of killing Shirleen Howard. State v.Webber, 292 N.W. 2d 5 (Minn. 1980).

imately three or four feet without speaking. The officers, who did not have an arrest warrant, entered and arrested Howard.

At the police station the police interrogated Howard. At one point he stated, "I don't think I'd better say any more -- til I have an attorney." The interrogating officer asked four more questions, then ceased the interrogation. The next morning, however, the interrogation continued. Howard asked, "Why don't I have an attorney here now"? The agent asked, "Would you rather have one present during our questioning"? Howard replied, "I guess not," and subsequently confessed to his involvement in the killing.

In his habeas petition, Howard contended that his conviction was ob-

tained in violation of the fourth amendment on the ground that the warrantless arrest inside his home was illegal. He further contended that his confession was improperly admitted into evidence inasmuch as it was obtained after a request for counsel.

In Payton v. New York, 445 U.S. 573, 583-90 (1980), the Supreme Court held that in the absence of exigent circumstances the fourth amendment forbids warrantless, nonconsensual entry into the home of a suspect for the purpose of making an arrest. Howard contends that the police, who admittedly did not possess a warrant, did not have his consent to enter his home. However, fourth amendment claims, including those arising under Payton, may not be raised in a

petition for habeas corpus when the state has afforded the petitioner a full and fair opportunity to litigate those claims. Stone v. Powell, 428 U.S. 465 (1980); United States v. Johnson, 457 U.S. 537, 562 n.20 (1982); see Gilbert v. Parke, 763 F.2d 821, 823-24 (6th Cir. 1985) (applying Stone to a Payton claim).

Howard argues that he did not have a full and fair opportunity to litigate his fourth amendment claim in state court because, he contends, the state court's factual finding of consent is not supported by the evidence. While the bar in Stone operates even when the state court has erroneously applied fourth amendment principles, Singleton v Frey, 793 F.2d 212, 213 (8th Cir.), cert. denied, 479 U.S. 934 (1986), a state court evidentiary hearing may be

less than full and fair if is yields factual determinations not fairly supported by the record as a whole. See Stone, 428 U.S. at 494 & n.36 (citing Townsend v. Sain, 372 U.S. 293, 313 (1963)); See also Cody v. Solem, 755 F.2d 1323, 1329 (8th Cir.). cert. denied, 474 U.S. 833 (1985); Hines v. Auger, 550 F.2d 1094, 1097 (8th Cir. 1977).

The state court found that Howard consented to the entry by the police, noting that he had given them a house key to enable them to search the premises, and that he stepped back three or four feet when he opened the door. Howard vigorously contends that he gave the police the key only for use when he was not at home, and that this did not amount to continuing consent to enter at any time. We might have some difficulty in

disagreeing with this argument if the house key were the only evidence of Howard's consent. However, while we do not regard Howard's act of giving the house key to the police as dispositive, it does tend to show some willingness on his part to allow the police into his home. Moreover, while Howard's act of stepping back while opening the door perhaps should not necessarily be viewed by a finder of fact as a tacit consent to entry, such act considered along with his earlier act of having furnished a house key certainly provides substantial evidence of consent to entry. Consequently, we cannot conclude that the state court's factual determinations are not fairly supported by the record as a whole, and we hold that Howard did receive a full and fair opportunity to

litigate his fourth amendment claim in state court. Further review by this court accordingly is barred.[3]

Next, we turn to Howard's claim that his confession should have been excluded on the ground that it was given after he made a request for counsel. In Edwards v. Arizona, 451 U.S. 477 (1981), the Supreme Court held that the fifth and fourteenth amendments require that questioning must cease when a criminal suspect asks for counsel. The state and federal courts found that Howard's request for counsel was equivocal, and not a "clear request" that would trigger the protection afforded Edwards. An ambiquous or equivocal

---

[3]Our conclusion with respect to the consent question makes it unnecessary for us to consider the State's claim that the arrest was justified by exigent circumstances.

request may in some instances be sufficient to require that questioning cease until counsel may be obtained. United States v. Lame, 716 F.2d 515, 521 & n.2 (8th Cir. 1983); see McCree v. Housewright, 689 F.2d 797, 801 (8th Cir. 1982), cert. denied, 460 U.S. 1088 (1983).

However, assuming for argument's sake that Howard was entitled to the benefit of Edwards, we conclude that any error in admitting his confession was harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 24 (1967); Johnson v. Nix, 763 F.2d 344, 346-47 (8th Cir. 1985). First, Howard's confession is to a degree cumulative and corroborative of his taped statements to Riniker. See Lam v. Iowa, No. 87-1958. slip op. at 7 (8th Cir. Nov. 9, 1988)

(quoting Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986)). Although he did not expressly state that he was involved in his wife's murder, the implication that this was so is inescapable. On the tape Howard said to Riniker:

> Butch, don't worry . . . Listen, let me tell you what happened. This guy -- I told you he had backed off. He didn't seem to want to do it. He called me up and said, "Do you still want to do that? and I said, "Yeah." I said O.K. I come home and that's what I found. He was planning an accident, it was supposed to be an accident. I was so God damn mad -- and it was gruesome.

Riniker said, "Don, I didn't think you were going to go through with it." Howard replied, "You know what I had to do, didn't you? . . . You promised me you wouldn't let me down, Butch, and it's done now and we can't undo it."

Howard then said, "Butch, do I have to live in a nightmare now . . . that you're going to crack . . ."?

A further sampling of the evidence at trial demonstrates that overall strength of the case against Howard. See id. Two men, Murphy and Riniker, testified that Howard had repeatedly tried to hire them to kill his wife. Howard told Murphy that he wanted to kill his wife rather than divorce her because he would lose his house and assets in a divorce. At one point Howard brought Murphy a gun with the serial number filed off. Evidence at trial further indicated that Howard contracted a man named Sorenson to commit the killing. At another point Riniker received from Howard $1,000.00 in cash, with a promise of future payments and a car, after Riniker agreed

to kill Shirleen Howard. Riniker changed his mind a few days later and returned the money.

While Howard's confession did enable the police to intercept Howard's final payment to Webber, other evidence overwhelmingly connected the two. Riniker saw a man in Howard's store; Howard told Riniker the man was from Joliet, Illinois, and that Howard had given him $2,000.00 and some weapons with which to murder his wife. Webber was from Joliet, and the record indicated a number of telephone calls between Howard and Webber. Within two months of the murder, Howard gave Webber a .45 caliber Llama handgun. Shirleen was killed with a .45 caliber Llama or .45 Star. The night before the murder Bruce Webber came to Winona, Minnesota, where Howard lived,

and registered at a motel. We conclude that the evidence against Howard was so overwhelming as to render harmless any violation of his rights under Edwards. See Harrington v. California, 395 U.S. 250, 254 (1968); Johnson, 763 F.2d at 347.

Finding no reversible legal or factual error on the part of the district court, we affirm.

A true copy.

Attest:

CLERK, U S. COURT OF APPEALS,
EIGHTH CIRCUIT